Supreme Court, U.S.
FILED
MAY 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1667

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD RHODE,
Petitioner,

v.

SAN JACINTO COUNTY, TEXAS,
Respondent

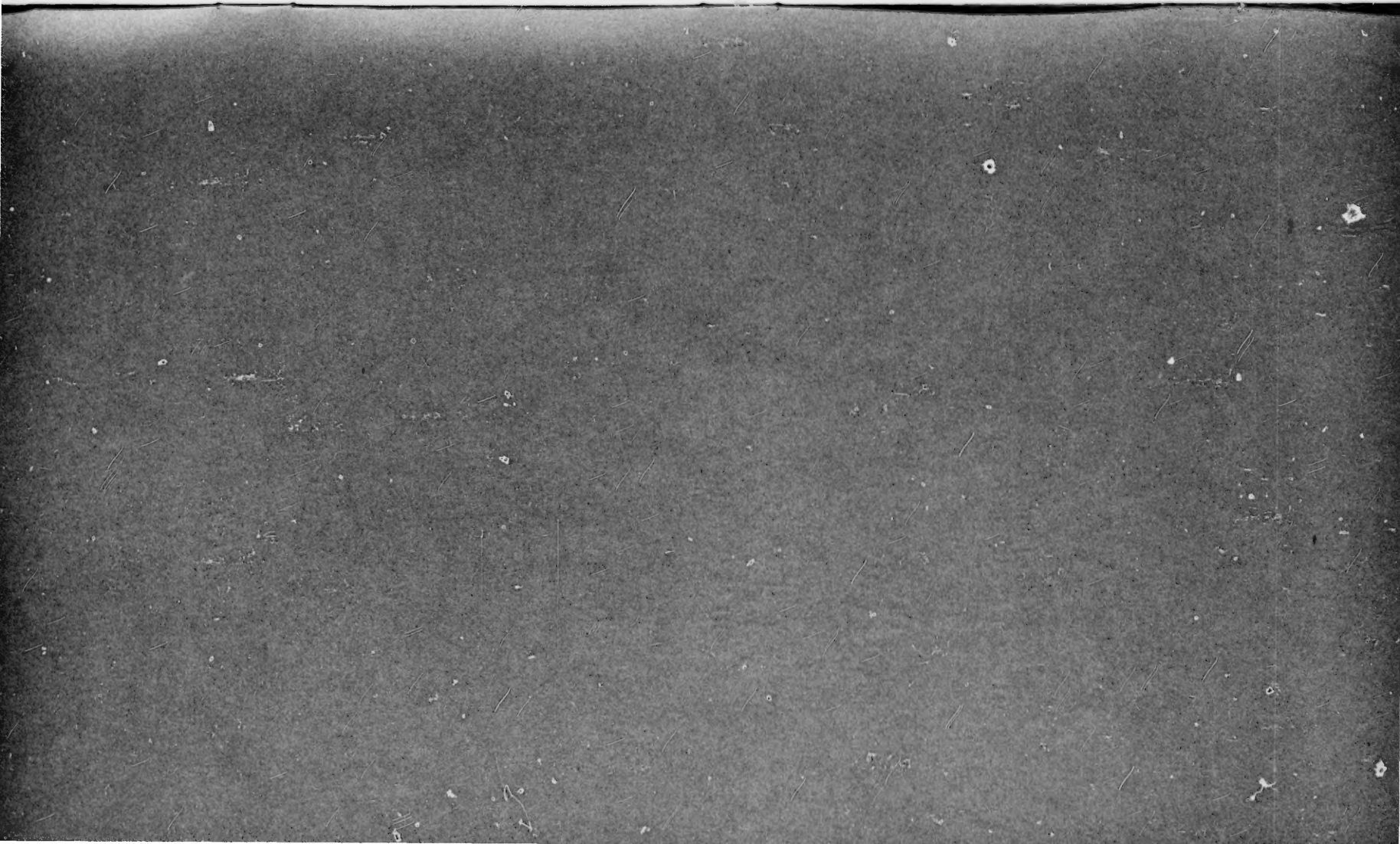
On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MEHAFFY, WEBER, KEITH & GONSOULIN
Interfirst Tower
P. O. Box 16
Beaumont, Texas 77704
Attorneys for Respondent, San Jacinto County, Texas

ARTHUR R. ALMQUIST
Of Counsel

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003



QUESTIONS PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Fifth Circuit err in holding that, where an elected County Constable responsible only to the voters of a single precinct in a county has personally made decisions and engaged in unlawful conduct related to his specific duties of office, such decisions and conduct cannot and do not constitute official county policy, custom, practice or procedure for which the county is liable under 42 U.S.C. § 1983, and *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978)?

Did the United States Court of Appeals for the Fifth Circuit err in holding that the constable in question was acting as a county employee at the time of the incident in question and not an employee of the state of Texas?

PARTIES

The petitioner has correctly stated the parties to this action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
PARTIES	1
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT AND AUTHORITIES	4
I. LIABILITY OF THE COUNTY FOR ACTIONS OF A CONSTABLE	4
II. THE CONSTABLE WAS ACTING AS A STATE OFFICIAL, NOT COUNTY OFFICIAL	7
CONCLUSION	8

TABLE OF AUTHORITIES

STATUTES

	Page
42 U.S.C. § 1983	1

CASES

	Page
Bennett v. City of Slidell, 735 F.2d 861 (1984) (en banc) *cert. denied*, 105 S. Ct. 3476, 87 L.Ed.2d 612 (1985)	2
Bexar County v. Linden, 110 Tex. 339, 220 S.W. 761, 763 (1920)	7
City of Oklahoma City v. Tuttle, ____U.S.____, 105 S. Ct. 2427, 85 L.Ed.2d 791 (1985)	1, 3, 6
Crane v. State of Texas, 759 F.2d 412, vacated in part on other grounds, 766 F.2d 193 (5th Cir. 1985) *cert. denied*, 106 S. Ct. 570, 88 L.Ed.2d 555 (1985)	2, 4
Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980)	2, 4
Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978)	1
Rhode v. Denson, 778 F.2d 790 (1985)	5
Van Ooteghem v. Gray, 774 F.2d 1332 (5th Cir. 1985)	4
Wisniewski v. United States, 353 U.S. 901, 1 L.Ed.2d 658, 77 S. Ct. 633 (1957)	3, 6

NO. 85-1667

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD RHODE,
Petitioner,

v.

SAN JACINTO COUNTY, TEXAS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondent questions the basis of jurisdiction cited by petitioner. Respondent believes that there is no conflict with this Court's decision in the case of *City of Oklahoma City v. Tuttle*, ____U.S.____, 105 S. Ct. 2427, 85 L.Ed. 2d 791 (1985) nor is there any conflict with the decision

of the Fifth Circuit Court of Appeals in *Crane v. Texas,* 759 F.2d 412, vacated in part on other grounds 766 F.2d 195 (1985) *cert. denied* 106 S. Ct. 970, 88 L.Ed. 2d 555 (1985). Moreover, an alleged conflict between decisions of the same circuit should not be the occasion for invoking the jurisdiction of this Court by Petition for Certiorari.

STATEMENT OF THE CASE

Petitioner's factual statement of the case is basically correct. Respondent would point out that Constable Denson's version of the facts of the incident are somewhat in conflict with those set out by petitioner in this case but Constable Denson did not appeal the jury verdict against him and those facts are not in issue.

Respondent does contest petitioner's characterization of the majority opinion below as establishing a rule which insulates a county from responsibility or liability for the acts of an elected official. The majority opinion plainly follows the Fifth Circuit's previous decisions in *Bennett v. City of Slidell,* 735 F.2d 861 (1984) (en banc) *cert. denied,* 105 S. Ct. 3476, 87 L.Ed.2d 612 (1985); *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980); *Crane v. State of Texas,* 759 F.2d 412, vacated in part on other grounds, 766 F.2d 193 (5th Cir. 1985) *cert. denied,* 106 S. Ct. 570, 88 L.Ed.2d 555 (1985), and expressly contrasts the limited range of choices available to a constable to the range of choices available to a county judge, sheriff or county treasurer for which liability may be imposed on a county. The decision is based upon the application of existing precedent to a narrow fact situation.

SUMMARY OF ARGUMENT

Petitioner's primary complaint is that the opinion below is in conflict with prior decisions of the Fifth Circuit Court of Appeals. This Court has previously held that doubt about the respect to be accorded to a previous decision of a different panel of the same circuit does not present an occasion for invoking its jurisdiction by petition for writ of certiorari. The reconciliation of such conflicts has been left to the respective courts of appeals. *Wisniewski v. United States,* 353 U.S. 901, 1 L.Ed.2d 658, 77 S. Ct. 633 (1957).

In fact, the opinion below is fully consistent with this Court's decision in *City of Oklahoma City v. Tuttle,* ____ U.S.____, 105 S. Ct. 2427, 85 L.Ed.2d 971 (1985), and the decisions of the Fifth Circuit upon which petitioner relies, which hold that an isolated incident of conduct on the part of a peace officer is not sufficient to establish such a policy or custom as to impose liability upon a municipal body. The position which petitioner urges this Court to accept would vastly increase municipal liability to levels beyond that contemplated by the Court in any of its prior decisions.

Further, at all times in question, Constable Denson was acting as an official of the State of Texas rather than as an official of San Jacinto County and was carrying out functions imposed by the State. Ultimate supervisory authority was retained by the State of Texas and not by San Jacinto County and San Jacinto County is not liable for his actions.

ARGUMENT AND AUTHORITIES

I.

LIABILITY OF THE COUNTY FOR ACTIONS OF A CONSTABLE

The heart of Petitioner's argument is that Respondent San Jacinto County should be held absolutely liable for the actions of Constable Denson because he is elected by voters of one precinct of the county and is not subject to the supervision of the county commissioners, nor is he subject to removal from office by any of the other county officials. Based upon these factors, petitioner argues that Constable Denson is the ultimate repository of authority with respect to law enforcement functions in the county.

The Fifth Circuit has given careful consideration to the question of which elected county officials can be said to be the ultimate repository of authority with respect to their functions in the county. In fact, the Fifth Circuit has probably given more consideration to these questions than any of the other circuits. As a result of their prior holdings, they have held that a county judge is such an official, *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980) and that a district attorney is such an official, *Crane v. State of Texas, supra.* The Court has also held that a county treasurer is such an official, *Van Ooteghem v. Gray,* 774 F.2d 1332 (5th Cir. 1985).

Recognizing those previous decisions, the panel of the Fifth Circuit in this case has declined to extend the county's absolute liability to include the acts of a county constable elected by only one-fourth of the voters in the county. Since a constable is elected from a single precinct he could continue to be elected even if a

majority of the voters in the county wished to remove him from office. To impose liability on the county would make no more sense than to impose liability on one county for the acts of a sheriff in a neighboring county since the majority of the voters in a single county have no more control over a constable in a single precinct than they do over the sheriff in the adjoining county.

Even more importantly than the limited nature of the constable's voting base is the fact that the Fifth Circuit has held that policy makers for purposes of county liability are not simply individuals who have the final say so on day to day matters but must be officials who decide goals for a particular governmental function and devise the means of achieving those goals. The panel below correctly held that a constable does not have the discretion, or range of choice that is at the core of the power to impose a policy upon a county. The limited range of choices which is available to him is no greater than that available to any peace officer who must decide whether to arrest for a misdemeanor committed in his presence. A constable does not have the authority to define objectives and to choose the means of achieving them as do other elected officials. *Rhode v. Denson,* 778 F.2d 790 (1985).

Thus, petitioner's major premise, that this case conflicts with prior decisions of the Fifth Circuit, must fail.

Even if there was such a conflict, this Court should not grant the petition for the reason that at most this case presents an inconsistency between decisions of separate panels of the Fifth Circuit. The task of reconciling any internal difficulties within circuit should rest

with the circuit and not with this Court and this case does not present a situation that would justify invoking the jurisdiction of this Court. *Wisniewski v. United States*, 353 U.S. 901, 1 L.Ed.2d 658, 77 S. Ct. 633 (1957).

Accepting the Fifth Circuit's decision below that a constable is not such a high policy making official as to be able to be said to represent the official policy of a county, it is plain that under the decision of this Court in *City of Oklahoma City v. Tuttle*, ____U.S.____, 105 S. Ct. 2427, 85 L.Ed.2d 791 (1985) that the actions of Constable Denson on this occasion do not constitute "policy". As the Court noted, the dictionary definition of policy "implies not only guiding and determining present but also *future* decisions". 105 S. Ct. at 2436. (emphasis added). An isolated incident does not establish policy or even suggest future decisions.

Further, the narrow factual question in *City of Oklahoma City v. Tuttle, supra,* was whether or not there had been a sufficient showing of a policy of failure to adequately train officers. That was the issue that was submitted to the jury in this case as well and the evidence in this case amounted to nothing more than that shown in *Tuttle,* that is a single incident of conduct with no showing that training or supervision itself was inadequate or that it was the cause of the incident.

In effect, what petitioner seeks is the imposition of liability upon a local governmental body based upon a theory of respondeat superior. That is a burden that this Court has not chosen to impose to date and this case certainly does not warrant such a dramatic change in the liability of municipal bodies for constitutional violations by its officials and employees.

II.

THE CONSTABLE WAS ACTING AS A STATE OFFICIAL, NOT COUNTY OFFICIAL

Although the decision of the Fifth Circuit Court of Appeals was properly grounded upon the most narrow basis of decision, Respondent would further submit that there are alternative grounds for the affirmance of the judgment below. Although these matters are not controlling on the decision to grant or deny certiorari, they are matters that would be presented to the Court by this case if certiorari is granted and Respondent wishes to point out one of those alternative grounds for affirmance.

At the time of the occurrence made the basis of this lawsuit, Mr. Denson was carrying out his law enforcement duties as a constable. He obtained those duties and powers to act as a law enforcement officer based upon Texas statutes. Vernon's Annotated Code of Criminal Procedure, Art. 2.12 and 2.13. As a Texas Court has put it:

> "A principal State function which [counties] perform in whose performance they exercise essentially State powers, is the administration of the State's justice. Their local courts exist for no other purpose. Their local constabulary is to keep the State's peace." *Bexar County v. Linden*, 110 Tex. 339, 220 S.W. 761, 763 (1920).

The local commissioner's court has no power to supervise the constables that are elected in the county. Further, they do not have the power to discipline or set standards for such individuals. The local commissioners cannot even remove a constable from office. In acting as

law enforcement officials, a constable's authority is created by the state and the state is the only entity that has the power to modify or change those duties or to discipline a constable. Thus, this is not the same as a case of a municipal body which can choose whether or not it desires to have law enforcement officials and impose whatever standards it deems appropriate with respect to training and certification. Liability for the acts of a constable carrying out duties mandated and solely supervised by the state should rest with the state and not with a county which is by law powerless to deal with errors by the constable in exercising his state functions.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this case does not present an appropriate case for this Court to exercise its jurisdiction by granting the Petition for Writ of Certiorari and respondent respectfully prays that the Court deny the Petition for Writ of Certiorari in its entirety.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Respondent,
San Jacinto County, Texas

By: _____

ARTHUR R. ALMQUIST,
Of Counsel
State Bar No. 01108800

Post Office Box 16
Beaumont, Texas 77704
409/835-5011

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record on this the 22nd day of May, 1986.

ARTHUR R. ALMQUIST